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October 30, 1997

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BY HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

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OCT 30 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: MM Docket No. 97-182

Dear Mr. Caton:

Submitted on behalf of Hubbard Broadcasting, Inc. pursuant Section 1.415 of the Commission's Rules is an original and four copies of the "Comments of Hubbard Broadcasting, Inc." in the above-referenced proceeding.

Sincerely,



Thomas J. Hutton

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Enclosures

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**Before The
Federal Communications Commission**

In re)
)
Preemption of State and Local) MM Docket No. 97-182
Zoning and Land Use Restrictions)
on the Siting, Placement and)
Construction of Broadcast Station)
Transmission Facilities)

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OCT 30 1997

To: The Commission

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

COMMENTS OF HUBBARD BROADCASTING, INC.

Hubbard Broadcasting, Inc. ("Hubbard"), by its attorneys and pursuant to Section 1.415 of the Commission's Rules, hereby comments in support of the proposed rule published by the Commission in its Notice of Proposed Rulemaking in this docket.¹ As the Commission has acknowledged, the implementation of digital television ("DTV") will require construction of new communications towers, modification of existing communications towers and displacement of existing communications licensees across the country. Hubbard acknowledges the important role of state and local governments in regulating such construction activities, but the proposed rule would not restrict that role unnecessarily. Rather, the proposed rule will provide a necessary framework for expediting state and local land use decisions, provide a process for resolving disputes on a timely basis, and impose preemptive limitations only as needed to eliminate restrictions at the state or local level that conflict with important federal regulations.

¹ 62 Fed. Reg. 46241 (Sept. 2, 1997).

1. Background.

Hubbard owns and operates television stations in large and small markets.² For one station, Hubbard must apply for a DTV construction permit by August 3, 1998 and construct the DTV facilities by November 1, 1999. For the other stations, Hubbard must apply for a DTV construction permit by November 1, 1999 and construct the DTV facilities by May 1, 2002. However, firm plans cannot be made at this point because the Commission is considering numerous petitions for reconsideration of its DTV decisions and the Commission's action on those petitions could result in a different DTV allotment for some or all of Hubbard's stations. Hubbard does know that in certain markets it will have to build a new tower or participate in the construction of a new joint tower with other stations.

Particularly in larger markets, obtaining state and local land use approvals is a difficult and time-consuming process. In many cases the area of potential tower sites is severely restricted by the location of airports, the lack of open space, and the need to provide a competitive signal. Land use restrictions are another layer of limitations. In the last 10-15 years, the process of obtaining state and local land use approvals for a communications tower has become extremely onerous, and in many cases impossible. There is a clear need for a rule that will expedite the local review process and eliminate

² Hubbard's television stations are: KSTP-TV, St. Paul, MN; WDIO-TV, Duluth, MN; WIRT(TV), Hibbing, MN; KSAX(TV), Alexandria, MN; KRWF(TV), Redwood Falls, MN; KOB-TV, Albuquerque, NM; KOB(R)TV, Roswell, NM; KOB(F)TV, Farmington, NM; WNYT(TV), Albany, NY; and WHEC-TV, Rochester, NY.

from state and local land use proceedings certain criteria that fall solely within the Commission's jurisdiction.

2. Concerns About State and Local Review of Proposed Towers.

Tower proponents face substantial regulatory difficulties in many areas of the country. The state and local land use review process is often lengthy, contentious and expensive. Tower opponents have contested tower proposals in local land use proceedings on the basis of potential hazard to air safety, notwithstanding Federal Aviation Administration ("FAA") approval of the tower proposal. Likewise, in other instances around the country tower opponents have relied on such factors as potential electronic interference, radiofrequency radiation, absence of demand and other factors that go far beyond the legitimate concerns of state and local agencies responsible for land use decisions.

In many jurisdictions, tower moratoria have been put in place in response to the proliferation of antennas for mobile communications. Although the legality of those moratoria is in question in many cases, such moratoria nevertheless present an obstacle to the goal of rapid implementation of DTV service. That is why the procedural requirements of the proposed rule are so important.

3. The Proposed Rule Should Be Adopted, With Slight Modifications.

There are two distinct aspects to the proposed rule. The first is the adoption of procedural requirements designed to ensure timely review and disposition of tower

proposals. Hubbard supports such requirements, particularly in light of the number of tower moratoria in effect in various jurisdictions. Television stations across the country face rigorous deadlines for implementing new DTV service, and state and local approvals will be required in order to satisfy those deadlines. Clearly, protracted delays in obtaining state or local approvals will impede the implementation of DTV service. It is particularly important to note that the successful launch of DTV service will require that the service become nationally available (and therefore nationally promoted by television set manufacturers, networks and program suppliers) around the same time, not on a fragmented basis. The adoption of the proposed procedural requirements will advance this important national goal. Hubbard does note that in some cases applicable state or local law requires public notice and public hearings on tower proposals, and additional time may need to be built into the Commission's procedural deadlines where such requirements apply.

The second aspect of the proposed rule is preemption of unreasonable restrictions on tower proposals. As the Commission noted in the Notice of Proposed Rulemaking, the Commission is the sole agency with jurisdiction over issues of electronic interference. The proposed rule would codify existing law on that issue. Likewise, the Commission is the federal agency empowered to rule on the potential for hazardous radiofrequency radiation to be emitted by broadcast stations, and any state or local review of that issue should be preempted. Although it would also be appropriate to preempt local review of tower proposals based on considerations of safety of air navigation, it is not clear that the Commission, rather than the FAA, has the power to

preempt such review. Nevertheless, the Commission clearly does have the more limited power specified in the proposed rule to preempt state or local review of tower lighting, painting or marking requirements. Hubbard supports the proposal to preempt that aspect of state or local review of tower proposals.³

Hubbard recommends that the Commission add one more area of preemption to its proposed rule. In some cases, state or local authorities have cited a lack of demand for a particular communications service as a ground for denying a tower proposal. In the case of DTV, the Commission and broadcasters are trying to foster a completely new service. At the outset, much of the new service is likely to consist of replication of existing NTSC service. Not only is there no quantifiable demand for DTV service, but there is a risk that state or local bodies will take the position that there is no need for it because it replicates an existing service. It is appropriate to preempt such action because it is directly contrary to the Commission's findings and decisions and will impede the implementation of DTV service as required by the Commission's regulations.

³ The Commission asked in its Notice of Proposed Rulemaking whether the proposed rule should apply to all broadcast tower proposals or whether it should be more limited. Clearly, there is and will be substantial co-location between TV and FM stations, so Hubbard believes the rule should apply to both. AM stations do not appear to be affected by DTV implementation, so the rule could appropriately exclude AM tower proposals.

4. Conclusion.

Hubbard supports the Commission's proposal to impose procedural requirements on state and local agencies reviewing tower proposals. Hubbard also supports the Commission's proposal to preempt unreasonable restrictions on tower proposals at the state or local level, and suggests that the Commission add a provision preempting any restrictions based on demand or lack of demand for a communications service to be made available from the proposed tower.

Respectfully submitted,

HUBBARD BROADCASTING, INC.

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